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Attorney General of the State of California,

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Deputy Attorney General of the State of California,

Solicitors for Appellee.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 530. 13

BEKINS VAN LINES, INC.; CHEW CHICK, doing business as BAY CITY HAULING CO.; KENNETH C. CLARK et al.,

Appellants,

vs.

RAY L. RILEY, as Controller of the State of California,

Appellee.

BRIEF OF APPELLEE

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Appellants,

vs.

RAY L. RILEY, as Controller of the State of California,

Appellee.

BRIEF OF APPELLEE

PRELIMINARY STATEMENT

This is a proceeding in equity in which the appellants, who operate motor trucks in the transportation of freight for compensation upon the public highways in the State of California as common carriers between fixed termini and over regular routes, seek to have the state enjoined from collecting a property tax which has been levied against appellants' opera-

tive property, pursuant to the provisions of the state law, for the year 1928.

The theory of suit is that the state law is discriminatory and confiscatory in violation of the due process of law and equal protection of the law clauses of the fourteenth amendment to the federal constitution.

Sitting under section 266 of the Judicial Code, the lower court denied injunctive relief and granted a motion to dismiss the bill of complaint.

STATEMENT OF THE CASE

Under section 15 of article XIII of the constitution of California property exclusively used by a person or company in the operation of the business of transporting property or persons as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route is taxable by the state, for state purposes, in an amount computed at a percentage of its gross receipts from operation. The percentage is five (5) per cent in the case of a freight carrier and four and one-quarter (4¼) per cent in the case of a passenger carrier. The state tax is in lieu of all other taxes and licenses, state, county and municipal, upon that property. The text of that section is set forth in full on pages XII to XVI, inclusive, of the appendix to appellants' brief.

The bill of complaint alleges that appellants were freight carriers of the class described in said sec-

tion (Tr. p. 3). It alleges that the operative property of appellants was levied upon by the state pursuant to the terms of that section, and enabling statutory legislation (Tr. p. 11), and prays that the state be enjoined from enforcing collection of the taxes so levied (Tr. p. 14).

The bill of complaint charges that section 15 of article XIII of the constitution of California offends against the equal protection of the laws clause in that the section does not apply to

(1) Contract or private carriers operating for hire between fixed termini or over regular routes upon the public highways;

(2) Contract or private carriers operating over the public highways, but not between fixed termini or over regular routes; and

(3) Common carriers for hire operating over the public highways, but not between fixed termini or over regular routes.

In their brief on this appeal, but not in the bill of complaint, appellants for the first time allege that said section denies them equal protection of the laws in that it discriminates illegally between carriers of freight and carriers of passengers in the matter of said percentages (p. 19).

The bill of complaint charges that section 15 of article XIII of the constitution of the State of California contravenes the due process of law clause in that

(1) Appellants have a tax burden under that section four times as heavy as the tax burden

borne by those carriers in whose favor it is claimed the section unjustly discriminates;

(2) The carriers, above referred to, excluded from the operation of said section, pay state and local taxes aggregating not more than five (5) per cent of the full value of property used by them exclusively in the operation of their business.

Upon the application for the interlocutory injunction the appellee relied solely upon the first ground of his motion to dismiss the bill of complaint, a general demurrer, and upon this appeal the appellee directs his reply to the merits of the proceeding, abandoning the other grounds set forth in said motion.

ARGUMENT

(1) The State Tax System in General.

In November, 1910, by constitutional amendment, adding section 14 to article XIII, the people of California adopted a tax system separating the sources of state and local taxation, departing from their original plan of taxing all property in proportion to its value. As a result of that change certain public utilities operating within and without the state were taxed upon their operative property at a percentage of their gross receipts from operation on business done in California. The state taxes on utilities, measured by their gross receipts from operation, have repeatedly been held by the Supreme Court of California to be property taxes and not taxes upon income.

San Francisco vs. *Pacific Telephone and Telegraph Co.*, 166 Cal. 244;
Pacific Gas & Electric Co. vs. *Roberts*, 168 Cal. 420;
Pacific Gas and Electric Co. vs. *Roberts*, 176 Cal. 183;
Southern Pacific Co. vs. *Levee District No. 1*, 172 Cal. 345;
Pullman Co. vs. *Richardson*, 185 Cal. 484;
Hartford Fire Ins. Co. vs. *Jordan*, 168 Cal. 270.

The system established by this amendment of 1910, as it affects car companies, telephone companies, banks and corporate excess, has been before this court in the cases of

The Pullman Company vs. *Richardson*, 261 U. S. 330, 43 S. Ct. 366;
Hopkins vs. *Southern California Telephone Co., et al.*, 48 S. Ct. 180;
Bank of California vs. *Richardson*, 248 U. S. 476;
Bank of California vs. *Roberts*, 248 U. S. 497;
Schwab vs. *Richardson*, 263 U. S. 88.

The amendment of 1910 did not subject motor carriers, or their operative property, to state taxation. They remained subject to local property and license taxes. In 1913, the legislature of California enacted the first Motor Vehicle Act. (Stats. of 1913, p. 639.) It has been superseded by the California Vehicle Act of 1923 (Stats. 1923, p. 517), as amended in 1925 (Stats. 1925, p. 398) and in 1927 (Stats. 1927, p. 1421).

In 1923, the legislature of California enacted a Motor Vehicle Transportation License Act imposing upon all persons and companies operating motor vehicles upon the public highways in the transportation of persons or property for hire a license fee in an amount computed at four (4) per cent of the gross receipts from operation, with a deduction of the aggregate amount of county and municipal taxes and licenses. The constitutionality of that act, tested by the equal protection of the laws clause, was declared in

Bacon Service Corporation vs. *Huss,* 199 Cal. 21,

and this court denied a writ of *certiorari.*

Bacon Service Corporation vs. *Huss,* 72 L. Ed. 224, 48 S. Ct. 158.

The Motor Vehicle Transportation License Act of 1923 was replaced by a similar act in 1925 (Stats. 1925, p. 833), the full text thereof appearing on pages I to XI of the appendix to appellants' brief. That act was upheld, against an attack based on the equal protection of the laws clause, by the State Supreme Court

In re Schmolke, 199 Cal. 42,

and a writ of *certiorari* denied by this court.

Schmolke vs. *O'Brien,* 273 U. S. 646.

Further pursuing the new plan established in 1910, the people of California in 1926 ratified an initiative measure adding section 15 to article XIII of the con-

stitution. The language of that section and its purpose is essentially the same as the language and purpose of section 14 of the same article, which deals with state taxation, by the gross receipts from operation method, of car companies, telephone companies and other utilities, but no appellate court in California has had occasion to determine any question, state or federal, with respect to section 15. The effect of the "in lieu" clause in section 15 was to remove from the operation of the Motor Vehicle Transportation License Act of 1925 motor carriers of the class described in section 15, but in 1927 that act was repealed (Stats. 1927, p. 1708) as of January 1, 1928.

For the purpose of collecting revenue for the state from those motor carriers who had been subject to the Motor Vehicle Transportation License Act of 1925 but who were not subject to the constitutional amendment of 1926 (Sec. 15 of Art. XIII), the legislature of California in 1927 amended sections 77 and 78 of the California Vehicle Act of 1923 by increasing the weight fees upon motor vehicles designed, used or maintained primarily for the transportation of passengers for hire, or for the transportation of property, over the public highways. The amendment was subjected to a referendum and therefore did not go into effect on January 1, 1928, as was intended by its proponents. The amendment appeared on the general state election ballot on November 6, 1928, and the referendum was defeated, the amendment going into effect on January 1, 1929. Sections 77 and 78 of the

California Vehicle Act are set forth in full in the appendix hereto.

It is expressly declared in said section 78 that the fees prescribed in said section 77 shall not apply to motor carriers of the class described in section 15 of article XIII of the California constitution.

Both common and contract motor carriers who do not operate between fixed termini or over a regular route, though not within the scope of section 15 of article XIII, are obligated to pay the state registration and weight fees required to be paid by the California Vehicle Act and such property taxes and local excises as may be imposed by counties, cities and other political subdivisions of the state.

(2) Section 15 of Article XIII of the California Constitution Does Not Deny the Equal Protection of the Laws.

The power of a state to classify property for the purpose of taxation, of course, is not disputed. The legal test by which the validity of the classification is determined is so clearly established and so generally understood that the parties hereto are not in disagreement in that regard. The sole issue is whether the classification created by section 15 of article XIII of the California constitution meets that test.

Section 22 of article XII of the constitution of California creates a so-called Railroad Commission, which would more properly be termed a public utility

commission for its jurisdiction is not confined to railroads, and it empowers that body

> "to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies * * *."

Section 23 of article XII of the constitution of California declares that "every common carrier" is a "public utility subject to such control and regulation by the Railroad Commission as may be provided by the legislature," and it gives to the commission such power to regulate public utilities and to fix their rates as the legislature of California may prescribe.

Pursuant to the terms of the aforesaid constitutional provisions the legislature of California enacted in 1917 the so-called "Auto Stage and Truck Transportation Act" (Stats. 1917, p. 330), the full text appearing in the appendix hereto. That act was before this court in the case of

Frost vs. *Railroad Commission,* 271 U. S. 583.

The said act of 1917 defines a "transportation company" as follows:

> "The term 'transportation company,' when used in this act, means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing, any automobile, jitney bus, auto truck, stage or auto stage used in the business of transportation of persons or property, or *as a common carrier,* for compensa-

tion, over any public highway in this state *between fixed termini or over a regular route,* and not operating exclusively within the limits of an incorporated city or town or of a city and county; provided, that the term 'transportation company,' as used in this act, shall not include corporations or persons, their lessees, trustees, receivers or trustees appointed by any court whatsoever, in so far as they own, control, operate or manage taxicabs, hotel busses, sightseeing busses or busses engaged solely in the transportation of bona fide pupils attending an institution of learning when such pupils are transported solely between their homes and such institution of learning, or any other carrier which does not come within the term 'transportation company' as herein defined."

Section 4 of that act confers upon the Railroad Commission power to supervise and regulate every transportation company, power to fix their rates, fares, charges, classifications, rules and regulations, power to regulate their accounts, service and safety of operations, and, in general, power in all other matters affecting the relationship between such companies and the traveling public.

Section 5 of that act requires every transportation company to procure a certificate of public convenience and necessity from the Railroad Commission before it begins to operate, and empowers the Commission to refuse to issue certificate, or to attach such conditions to the exercise of the rights granted by the

certificate, as, in its judgment, the public convenience and necessity may require.

The classification set up in said act of 1917 has not been subjected to the test of the equal protection of the laws clause, and it is that classification which was written into section 15 of article XIII of the state constitution after the classification had remained unchallenged for nine years in the 1917 statute.

Appellants seem to rely heavily upon the decision by this court in the *Frost* case, *supra,* but this court, in considering the said 1917 act, did not pronounce unreasonable the grouping in one class for special treatment of common carriers operating for compensation upon the public highways between fixed termini or over a regular route. In 1919, the legislature of California purported, by amendment to the act of 1917, to include within the scope of that act private carriers. This court held that under the guise of highway regulation a state can not force a private carrier to assume the status of a public carrier.

In applying for certificates of public convenience and necessity under the act of 1917 the appellants proceeded voluntarily and presumably for the purpose of securing to themselves benefits and advantages which otherwise they would not enjoy. They were free to remain private or contract carriers outside of the reach of the act of 1917. From the face of that act it is apparent that it has many attractive

features for the motor carrier. It protects against undue competition from carriers of the same kind. It assures the carrier, as well as the public, of a fair rate. It puts the carrier in a position of stability conducive to the growth of its business, and is calculated to bring to the carrier the confidence of the traveling public. These are some of the reasons which justify the classification established in the act of 1917 and in section 15 of article XIII. There are other reasons. The people of California, in setting up the classification in section 15 of article XIII, and treating the members of that class differently in the matter of tax burden, doubtless had in mind not only the advantages which they possess under state protection and regulation but also the peculiar relation they bear to the public highways.

The operations of a common carrier necessarily imply regularity and frequency in the use of the public highways, and the people probably took into consideration the extent of that use. The operation of a common carrier between fixed termini or over a regular route suggests not only an extensive use of the public highways, but a regular and constant wear and tear upon the same highways or portions thereof. The tax upon motor carriers under section 15 of article XIII is essentially a property tax, by analogy from the *Pullman* case, *supra,* but, viewed as a privilege tax, it adequately meets the test of reasonableness in classification required by the fourteenth amendment.

Common carriers operating for compensation over particular routes are not unlike railroads which traverse the same path between definite points, and this court has held that railroads constitute a class whose property may be taxed differently and whose property may be taxed additionally if the state constitution does not require equality in the matter of tax burden.

Southern Railroad Co. vs. *Watts,* 260 U. S. 519; 43 S. Ct. 192.

The Supreme Court of California, discussing the Auto Stage and Truck Transportation Act of 1917 in its opinion in

Frost vs. *Railroad Commission,* 197 Cal. 230,

said:

"The primary purpose of such regulation is to secure the adequacy, regularity and reliability of service and the reasonableness of rates and charges therefor (*Franchise Motor Freight Assn.* vs. *Seavey,* 69 Cal. Dec. 473, 235 Pac. 1000). To accomplish this end there must of necessity be some restriction upon competition. As was said by the Supreme Court of Washington: 'The purpose of the transportation act * * * is to permit the establishment of regular and dependable service whenever public necessity and convenience requires. No adequate service can be given without proper equipment * * *. An income must be earned, which will cover operating costs and depreciation, and give some return on the investment or the service can not be long continued."

Discussing sections 22 and 23 of article XII of the California constitution, with particular reference to motor carriers, our Supreme Court has said in the case of

Western Association of Short Line Railroads vs. *Railroad Commission*, 173 Cal. 802,

"These automobile stage companies carry passengers to great distances, over many and devious roads. It is a part of common knowledge that one may travel by this method at least from San Diego to Sacramento, and doubtless farther—a distance of over six hundred miles. Thousands of passengers are thus carried over mountains and plains. Aside from the mere matter of the regulation of fares, every consideration suggests the desirability, if not the need, of safety regulations touching the care and upkeep of the machines, the skill and prudence of the chauffeurs, etc. And touching the movement of freight, while in many instances these truck companies parallel railroads, in others they enter, unrestricted and uncontrolled, into new territory. Modern transportation has unquestionably reached the point where it is no more an answer to the farmer who thinks that the rates of the auto truck which passes his farm are extortionate, to say that he may haul his own product, than it would be to make him the same answer if he were complaining of a railroad extortion. And, moreover, it is not only a matter of common knowledge, but is presented in these cases, that in many instances these unregulated companies interfere seriously with the revenues of controlled public utilities, a

percentage of whose revenues goes by way of taxes to the support of the state."

This court has held not only in the *Frost* case, but also in

Michigan Public Utilities Commission vs. *Duke*, 266 U. S. 570, 45 S. Ct. 191,

that a state can not, by a legislative fiat, convert property used exclusively in the business of a private carrier into a public utility for in so doing it would take private property for public use without just compensation. That pronouncement points out the fundamental difference between a common carrier and a contract carrier, and since they are members of distinct classes for the purpose of highway regulation it would seem to follow logically that they may be reasonably placed in different classes for the purpose of taxation. This court has held that the classification of auto transportation companies so as to include those who use the public highways for the transportation of passengers or freight for hire as a business, is not unreasonable, and the fact that others may make use of the same highways without being subject to an act affecting the former does not render the classification arbitrary or unreasonable, the distinction between private use and public use being sufficient upon which to base the classification.

Packard vs. *Banton*, 264 U. S. 140; 44 S. Ct. 257;
Sanger vs. *Lukens*, 24 Fed. (2d) 226;
Smallwood vs. *Jeter*, 244 Pac. 149 (155).

In the *Packard* case it is recognized that density and continuity of traffic are factors justifying particular measures, and those elements are present in the case of a common carrier using the public highways in carrying on a business between fixed termini or over a regular route.

A privilege tax imposed by a Michigan statute affecting common carriers engaged in the business of transporting persons or property for hire upon the public highways over fixed routes or between fixed termini was involved in the case of

Liberty Highway Co. vs. *Michigan Public Utilities Com.,* 294 Fed. 703.

It was there contended, as here, that the statute violated the equal protection of the laws clause, but the court sustained the statute, declaring

> "The statute is not class legislation because it applies only to common carriers operating over fixed routes. It is well known that commercial motor vehicle transportation, and highway maintenance expense resulting therefrom, is rapidly increasing; that traffic on main highways is greatly congested. It is not an unreasonable classification under the police power to make a distinction between those common carriers whose use of the highways is more regular, and hence more frequent, and whose operation on the highways is attended with greater danger to life and property, and greater damage to the highways, and those carriers whose use of the highways is only occasional and spasmodic. Such a dis-

tinction does not constitute an arbitrary discrimination, it being settled that every state of facts sufficient to sustain a classification which can be reasonably conceived of as having existed when the statute was enacted will be assumed by the court. *Crescent Cotton Oil Co.* vs. *Mississippi,* 257 U. S. 129, 42 Sup. Ct. 42, 66 L. Ed. 166; *Nolen* vs. *Reichman, supra.*"

The state of Iowa has enacted a statute requiring the payment of certain license fees by automotive common carriers engaged in the transportation of passengers and freight over regular routes, on scheduled trips, and between fixed termini, upon the public highways. It survived an attack predicated upon the equal protection clause,

Iowa Motor Vehicle Association vs. *Board of Railroad Commissioners,* 221 N. W. 364 (367),

the court saying:

"It is the prerogative of the legislature to classify property for the purpose of taxation. It has done so in the instant matter. It has placed motor vehicles, engaged as common carriers in the transportation of passengers and freight over regular routes, on scheduled trips and between fixed termini, in one class, and all other commercial and miscellaneous motor vehicles in another class. This results in a legislative finding that there was sufficient difference in the use made of the public highways to justify the difference in classification. Shall this court say that there was no basis of fact for the finding? If there is any reasonable ground for the classifi-

cation and the law operates equally upon all within the same class, there is no violation of the constitutional inhibition, either state or federal, relating to class legislation, equal protection of the laws, the abridgment of privileges or immunities of citizens, or depriving persons of property or liberty without due process of law. It is presumed that the legislature acted reasonably in making the classification, and the burden is on the challenger to prove that the classification does not rest upon a reasonable basis, but is essentially arbitrary and palpably discriminating.

The state may reasonably regulate the manner and extent of the use of its public highways by common carriers, and the quantum of the privilege tax for the use of the highways need not necessarily be limited to the actual cost of such regulation, but may also, as in the instant case, include compensation for the use of highways and provision for anticipated repairs and improvements thereon. The statute in question is not class legislation because it applies only to common carriers of fixed routes. We may take judicial notice that commercial motor vehicle transportation and highway maintenance expense resulting therefrom is rapidly increasing, and that traffic on the main highways is becoming more and more congested. It is not an unreasonable classification for the legislature to make a distinction between those common carriers whose use of the highway is regular and hence more frequent and whose operation is attended with great danger of life and property and great damage to the highways, and those carriers whose use of the

highways is only occasional and spasmodic. Such a distinction does not constitute an arbitrary discrimination, provided that the state of facts is sufficient to sustain the classification. See *Liberty Highway Co. et al.* vs. *Michigan Public Utilities Commission et al.* (D. C.) 294 F. 703, with cases cited."

Other cases, all tending to support the classification in section 15 of article XIII of the California constitution, are

Fish Bros. Co. vs. *Brown,* 146 N.E. 100 (103);
Barbour vs. *Walker,* 259 Pac. 552;
Willis vs. *Buck,* 263 Pac. 982;
State vs. Peterson, 198 N.W. 1011;
State vs. *Oligney,* 202 N.W. 893;
Northwest Auto Co. vs. *Hurlburt,* 207 Pac. 161 (164);
State vs. *Le Febvre,* 219 N.W. 167.

In the *Le Febvre* case, last cited, the Minnesota statute applied only to common carriers operating between fixed termini or over a regular route.

California cases dealing with motor vehicle regulations and observing the propriety of classifying motor vehicles according to considerations of horsepower, weight, and the nature and extent of use of public highways by them, are

Matter of Schuler, 167 Cal. 282;
Matter of Stork, 167 Cal. 294;
Old Homestead Bakery vs. *Marsh,* 75 Cal. App. 247;
Bacon Service Corporation vs. *Huss, supra;*
In re Schmolke, supra.

A property tax upon motor carriers using the public highways, which was in lieu of all other taxes except wheelage taxes, was the subject of consideration in the case of

Raymond vs. *Holm,* 206 N.W. 166.

Freight carriers assailed a provision in the taxing statute which separately classed and treated trucks engaged in commercial freighting "on regular time or route schedules." The court said that the complainants had the option of placing their trucks in either class; that where there is a free choice and property is placed in a particular class the one who exercises that choice "is hardly in position to claim discrimination because that class is subjected to burdens not imposed upon another class in which he could have placed it and in which he may still place it if he chooses to do so."

Further the court said:

> "The sole reason for placing or keeping the relators' truck in the class of trucks operating on a time and route schedule is to secure advantages not possessed by trucks in the other class. Unless they deemed such advantages sufficient to outweigh the additional burdens, they would not keep their truck in that class."

In concluding that the provision expressed legal classification the court said:

> "It is the province of the legislature to determine what differences furnish a sufficient reason

for placing property in one or another class for the purpose of taxation; and the legislative determination is binding on the courts unless clearly fanciful and arbitrary. The legislature is presumed to have had full information concerning the matters in respect to which it legislates, and, in view of the rules governing the courts in passing on the validity of legislative enactments, we can not say that the legislature did not find a sufficient difference in the use of the public highways by those trucks engaged in commercial freighting which operate on regular time and route schedules and those which do not so operate to permit them to be placed in different classes for the purpose of taxation. We can not pronounce the differences so wanting in substance that the classification is purely arbitrary and therefore invalid

Here, as already noted, the appellants voluntarily placed themselves in the class covered by section 15 of article XIII when they had the option of remaining outside of that class. Presumably they entered that class to secure advantages denied to carriers not in that class. That there are such advantages, in fact as well as in theory, is manifest from the decisions of the Railroad Commission of California protecting certificated common carriers operating for compensation between fixed termini or over regular routes against competition not demanded, in the opinion of the commission, by public necessity or convenience, of which the following decisions are representative.

Application of Ben Moore, 27 C. R. C. 388;
Coronado Transfer vs. *United Parcel Service of San Diego,* 31 C. R. C. 208;
Application of J. W. Ritzman, 31 C. R. C. 773;
Thornewell vs. *Gregory,* 31 C. R. C. 843;
Petaluma & Santa Rosa Ry. Co. vs. *Deysar,* 32 C. R. C. 141.

Against this array of authority appellants put forward the decision by this court in

Quaker City Cab Co. vs. *Pennsylvania,* 72 L. Ed. 609,

asserting in their brief that it is almost identical with the instant case (p. 29). It is not even similar. It is one of the very recent pronouncements by this court on the matter of classification, but to that extent only is it in point here. Therein it was held by this court that a state can not justly discriminate between corporations and individuals in imposing licensing requirements upon the conduct of the taxi-cab business for the reason that the distinction in the character of the ownership is not sufficient to warrant the differentiation in treatment.

The only case in point tending to support appellants' view is a New Jersey decision not cited by the appellants.

Weimar Storage Co. vs. *Dill,* 143 Atl. 438.

It concedes that common carriers may properly be placed in a separate class and charged a higher rate than other vehicles, but holds that it is not reasonable

to impose a tax only on common carriers or to confine it to commercial vehicles operating between fixed termini or over a regular route. The decision does not disclose the course of reasoning by which the result was reached, and the only authority cited for the conclusion expressed is the *Quaker City Cab* case, which merely reiterates the test of proper classification. Devoid of reasons therefor, the holding of the New Jersey court has little if any persuasion and it is mentioned by the appellee only because examination of the authorities has revealed its existence.

In fairness to the court from which this appeal is taken, it would seem reasonable for this court not to entertain the objection of appellants that section 15 of article XIII of the California constitution creates an unwarranted discrimination in the matter of the percentages or rates to be applied to the gross receipts base in taxing the operative property of freight and passenger carriers, for the objection is first raised in this court. But that ground of complaint is not serious. Considering the inherent differences between the types of motor vehicles designed and used in passenger transportation and in the transportation of property, in relation to their effect upon the public highways which they traverse, courts have indicated that it would be reasonable to distinguish between them in the matter of tax burden. They vary in weight, in the horsepower of the engines, in the size and construction of their tires, and consequently do not have the same effect upon the highways over which their business is conducted.

Hendrick vs. *Maryland*, 235 U. S. 610 (632);
Raymond vs. *Holm*, (Minn.), *supra;*
Iowa Motor Vehicle Asso. vs. *Bd. of Railroad Commissioners* (Iowa), *supra;*
Liberty Highway Co. vs. *Michigan Public Utilities Co., supra;*
Old Homestead Bakery, Inc. vs. *Marsh, supra;*
Matter of Schuler, supra;
Morris vs. *Duby*, 274 U. S. 135, 47 S. Ct. 548.

The many cases cited by the appellee point, we believe, irresistibly to the reasonableness of the classification created by section 15 of article XIII of the California constitution.

Repeatedly it has been declared by this court that the fourteenth amendment does not forbid classification and that the power of a state to classify for the purpose of taxation is of wide range and flexibility; provided always that the classification be reasonable, not arbitrary, and that it rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.

Louisville Gas and Electric Co. vs. *Coleman*, 48 S. Ct. 423.

(3) Section 15 of Article XIII of the California Constitution Does Not Deprive Appellants of Due Process of Law.

The bill of complaint alleges that the tax burden upon the carriers of the class described in section 15

of article XIII is greatly in excess of the aggregate tax burden, state and local, of contract carriers and of common carriers who do not operate between fixed termini or over regular routes, but since that section sets up a classification which courts recognize as sound, appellants can not expect relief under the due process of law clause without alleging confiscation resulting from an unconscionable tax burden resting upon them.

There is no claim by appellants that the taxes in question clearly result in such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation, in other words, "to spoliation under the guise of exerting the power of taxing."

Dane vs. *Jackson,* 256 U. S. 589, 599.

This court has held that a state tax does not violate the fourteenth amendment merely because it is excessive in amount. An encroachment on private rights so clear and palpable as to leave no doubt that the attempted taxation by its necessary operation is really spoliation under the guise of exercising the power to tax must be pleaded and proved before relief can be had under the fourteenth amendment.

The Michigan Telephone Tax Cases, 185 Fed. 634, 229 U. S. 322, 335.

It is fundamental that the power of taxation of each of the states over all persons and property

within its jurisdiction is an inherent and not a delegated power and knows no limits except those imposed expressly or by plain implication in the federal constitution.

Vol. 26 R. C. L. Par. 63;
McCulloch vs. *Maryland,* 4 Wheat. 315;
State Tax on Foreign Held Bonds, 15 Wall. 300.

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

The fourteenth amendment was not intended to compel the states to adopt an iron rule of equal taxation.

Bells Gap Rd. Co. vs. *Pennsylvania,* 134 U. S. 232;

Henderson Bridge Co. vs. *Henderson,* 173 U. S. 592;

Wagner vs. *Baltimore,* 239 U. S. 207.

CONCLUSION

We submit, therefore, that the decree of the lower court denying the motion for an interlocutory injunction and granting the motion to dismiss the bill of complaint is a proper order and is entitled to affirmance.

Respectfully,

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Deputy Attorney General,
Attorneys for Appellee.

APPENDIX

EXCERPTS FROM CALIFORNIA VEHICLE ACT

(Chapter 844, Statutes 1927.)

Sec. 77. (*a*) A registration fee of three dollars shall be paid to the division for the registration of every motor vehicle, trailer or semitrailer, except for those which are exempted in this act, and such fee shall be paid at the time application is made for registration.

(*b*) In addition to the registration fee specified in subdivision (*a*) of this section, there shall be paid for the registration of every electric passenger motor vehicle a registration fee of ten dollars, and for the registration of every electric motor vehicle designed, used or maintained primarily for the transportation of passengers for hire, or for the transportation of property, there shall be paid fees according to the following schedule:

For each such vehicle weighing, when unladen, less than six thousand pounds	$50.00
For each such vehicle weighing, when unladen, six thousand pounds or more, but less than ten thousand pounds	70.00
For each such vehicle weighing, when unladen, ten thousand pounds or more	90.00

(*c*) The following registration fees in addition to the registration fee specified in subdivision (*a*) of this section shall be paid for the registration of vehicles, including trailers and semitrailers, designed, used or maintained primarily for the transportation of passengers for hire or for the transportation of property, according to the following table, except

that the fees specified in this subsection need not be paid for electric vehicles.

When such vehicles are equipped wholly with pneumatic tires:

For each such vehicle weighing, when unladen, three thousand pounds or more, but less than six thousand pounds---------- $20.00

For each such vehicle weighing, when unladen, six thousand pounds or more, but less than ten thousand pounds and limited under the provisions of this act to a total weight, including vehicle and load, not exceeding twenty-two thousand pounds---------- 40.00

For each such vehicle weighing, when unladen, ten thousand pounds or more and limited under the provisions of this act to a total weight, including vehicle and load, not exceeding twenty-two thousand pounds--- 50.00

For each such vehicle weighing, when unladen, six thousand pounds or more and entitled under the provisions of this act to a total weight, including vehicle and load, in excess of twenty-two thousand pounds------ 70.00

When such vehicles are not equipped wholly with pneumatic tires there shall be paid in addition to the fees specified in subdivision (*a*) of this section fees according to the weight thereof unladen amounting to twice the fees set forth in the foregoing table.

Upon registration issued after the beginning of the registration year, the fees required under subdivisions (*b*) and (*c*) of this section shall be reduced by one-fourth for each three months which shall have elapsed since the beginning of the registration year.

(*d*) If the license tax provided for by that certain act entitled "An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes, prescribing penalties for violation of the provisions of said act, and repealing all acts and parts of acts inconsistent herewith," heretofore adopted by the legislature at its forty-fifth session is held by the Supreme Court of the State of California, or by the Supreme Court of the United States, to be unconstitutional, then beginning with the first year next succeeding the date upon which such decision becomes final there shall be paid upon and for the registration and reregistration of every motor vehicle with the division of motor vehicles, in addition to any other fees imposed by law, a registration fee of five dollars for every electric motor vehicle and for every other motor vehicle a fee amounting to the sum of forty cents for each horsepower or major fraction thereof of such motor vehicle and a proportionate amount thereof for the registration of such vehicle for a period of less than one year. The horsepower of any motor vehicle, except electric or steam driven motor vehicles, shall be determined by the formula commonly known as that of the Association of Licensed Automobile Manufacturers (A. L. A. M.), being as follows: Square the diameter of the cylinder in inches, multiply by the number of cylinders, and divide by two and five-tenths; *provided,* that for the purposes hereof the horsepower of any steam driven motor vehicle shall be the horsepower rating fixed and advertised by the manufacturer thereof. In the

event that the registration fees for electric motor vehicles and fees based on horsepower as hereinabove specified shall be collected, all such fees shall be paid into the motor vehicle fund of the State of California, and shall be distributed and used for such purposes as may be provided by law for the distribution and use of such motor vehicle fund; *and provided, further,* that in the event the provisions of this section, relative to registration fees, based upon horsepower rating, shall become effective the provisions of this section contained in subdivisions (*a*) and (*b*) shall be deemed to be superseded.

(Chapter 752, Statutes 1927)

Sec. 78. The registration fees specified in this act, except fees for duplicate number plates or certificates, need not be paid for any motor vehicle, trailer or semitrailer owned by any foreign government or by a consul, or other official representative thereof, or by the United States, or by any state or political subdivision thereof, or owned by a voluntary fire department organized under the laws of this state when such vehicles are used exclusively for fire fighting purposes, nor for any like vehicle owned by or used exclusively in the operative work of such corporations as are taxed solely for state purposes under the constitution of this state, nor for any like vehicle used exclusively by a company in the operative work of its business of transportation of persons or property as a common carrier for compensation over any public highway of this state between fixed termini, or over a regular route, and subject to taxation under the provisions of section 15 of article XIII of the

constitution of the State of California. All such vehicles shall be registered as herein required by the person having custody thereof and such custodian shall display official registration plates bearing distinguishing marks thereon which shall be furnished by the division free of charge.

AUTO STAGE AND TRUCK TRANSPORTATION ACT

Chapter 213, Statutes 1917, Page 330.

SECTION 1. (*a*) The term "corporation," when used in this act, means a corporation, a company, an association or a joint stock association.

(*b*) The term "person," when used in this act, means an individual, a firm or copartnership.

(*c*) The term "transportation company," when used in this act, means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing, any automobile, jitney bus, auto truck, stage or auto stage used in the business of transportation of persons or property, or as a common carrier, for compensation, over any public highway in this state between fixed termini or over a regular route, and not operating exclusively within the limits of an incorporated city or town or of a city and county; *provided,* that the term "transportation company," as used in this act, shall not include corporations or persons, their lessees, trustees, receivers or trustees appointed by any court whatsoever, in so far as they own, control, operate or manage taxicabs, hotel busses, sightseeing busses or busses engaged solely in the transportation of bona fide pupils attending an institution of learning when

such pupils are transported solely between their homes and such institution of learning, or any other carrier which does not come within the term "transportation company" as herein defined.

(*d*) The term "public highway," when used in this act, means every public street, road or highway in this state.

(*e*) The words "between fixed termini or over a regular route," when used in this act, mean the termini or route between or over which any transportation company usually or ordinarily operates any automobile, jitney bus, auto truck, stage or auto stage, even though there may be departures from said termini or route, whether such departures be periodic or irregular. Whether or not any automobile, jitney bus, auto truck, stage or auto stage is operated by a transportation company "between fixed termini or over a regular route" within the meaning of this act shall be a question of fact and the finding of the railroad commission thereon shall be final and shall not be subject to review. (Amended, Stats. 1925, Ch. 145, p. 297.)

SEC. 2. No corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall operate any automobile, jitney bus, auto truck, stage or auto stage for the transportation of persons or property for compensation on any public highway in this state except in accordance with the provisions of this act. (Section 3 repealed by Ch. 280, Stats. 1919, p. 457.)

SEC. 4. The railroad commission of the State of California is hereby vested with power and authority to supervise and regulate every transportation com-

pany in this state; to fix the rates, fares, charges, classifications, rules and regulations of each such transportation company; to regulate the accounts, service and safety of operations of each such transportation company, to require the filing of annual and other reports and of other data by such transportation companies; and to supervise and regulate transportation companies in all other matters affecting the relationship between such companies and the traveling and shipping public. The railroad commission shall have power and authority, by general order or otherwise, to prescribe rules and regulations applicable to any and all transportation companies. The railroad commission, in the exercise of the jurisdiction conferred upon it by the constitution of this state and by this act, shall have power and authority to make orders and to prescribe rules and regulations affecting transportation companies, notwithstanding the provisions of any ordinance or permit of any incorporated city or town, city and county, or county, and in case of conflict between any such order, rule or regulation and any such ordinance or permit, the order, rule or regulation of the railroad commission shall in each instance prevail.

SEC. 5. No transportation company shall hereafter begin to operate any automobile, jitney bus, auto truck, stage or auto stage for the transportation of persons or property, for compensation, on any public highway in this state without first having obtained from the railroad commission a certificate declaring that public convenience and necessity require such operation, but no such certificate shall be required of any transportation company as to the

fixed termini between which or the route over which it is actually operating in good faith at the time this act becomes effective, or for operations exclusively within the limits of an incorporated city, town, or city and county. Any right, privilege, franchise or permit held, owned or obtained by any transportation company may be sold, assigned, leased, transferred or inherited as other property, only upon authorization by the railroad commission. The railroad commission shall have power, with or without hearing to issue said certificate as prayed for, or to refuse to issue the same, or to issue it for the partial exercise only of said privilege sought, and may attach to the exercise of the rights granted by said certificate such terms and conditions as, in its judgment, the public convenience and necessity may require; *provided,* that no such certificate may be granted to a foreign corporation.

The railroad commission may at any time for a good cause suspend and upon notice to the grantee of any certificate and opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of this section.

Every application for a certificate of public convenience and necessity must be accompanied by a fee of fifty dollars. (Amended, Stats. 1927, Ch. 64.)

SEC. 6. No transportation company may issue any stock or stock certificate, or any bond, or any note or other evidence of indebtedness payable at a period of more than twelve months after the date thereof, nor execute any mortgage or other lien on any of its property to secure the payment of such indebtedness, unless such transportation company, in addition to the other requirements of law, shall first

have secured from the railroad commission an order authorizing such issue and stating the amount thereof and the purpose or purposes to which the issue or the proceeds thereof are to be applied and that, in the opinion of the railroad commission, the money, property or labor to be procured or paid for by such issue is reasonably required for the purpose or purposes specified in the order and that, except as otherwise permitted in the order in the case of bonds, notes and other evidences of indebtedness, such purpose or purposes are not, in whole or in part, reasonably chargeable to operating expenses or to income. Such order may be made, in the discretion of the railroad commission, either with or without a public hearing. Except as in this section otherwise provided, the provisions of section 52 of the public utilities act referring to the purposes for which stocks and stock certificates, bonds, notes and other evidences of indebtedness, may be issued and the application of and the accounting for the proceeds thereof, the powers and duties of the railroad commission and the rights and duties of public utilities with reference thereto, the legal status of stocks and stock certificates and of bonds, notes and other evidences of indebtedness, issued without an order of the railroad commission then in effect, and the relationship of the State of California to such stocks and stock certificates, and such bonds, notes and other evidences of indebtedness, shall apply to and govern the issue of stocks and stock certificates, and of bonds, notes and other evidences of indebtedness, of transportation companies with the same force and effect as though section 52 of the public utilities act were restated in this section with the substitution of the

words "transportation companies" for the words "public utility" and of the words "transportation companies" for the words "public utilities." The provisions of section 57 of the public utilities act referring to fees to be charged and collected by the railroad commission for certificates authorizing the issue of bonds, notes or other evidences of indebtedness of public utilities shall apply to and govern authorizations by the railroad commission of the issue by transportation companies of bonds, notes or other evidences of indebtedness. (Amended, Stats. 1927, Ch. 28.)

SEC. 6*a*. Every transportation company shall annually furnish to the commission at such time and in such form as the commission may require a report in which the transportation company shall specifically answer all questions propounded by the commission upon or concerning which the commission may desire information. The commission shall have authority to require any transportation company to file monthly reports of earnings and expenses, and to file periodical or special or both periodical and special reports concerning any matter about which the commission is authorized by this or any other act to enquire or to keep itself informed, or which it is required to enforce. All reports shall be under oath when required by the commission. (Added Stats. 1921, Ch. 840, p. 1609.)

SEC. 6*b*. No transportation company subject to the provisions of this act shall, directly or indirectly, issue, give or tender any fare, ticket, free pass, or free or reduced rate transportation for passengers or freight between points within this state, except to such person or persons as common carriers under

and in accordance with the provisions of the public utilities act, are permitted to issue such fare, ticket, free passes, or free or reduced transportation and except to officers or employees of transportation companies as defined under this act. (Added Stats. 1921, Ch. 840, p. 1609.)

SEC. 6*c*. No transportation company shall henceforth assume any obligation or liability, as guarantor, endorser, surety or otherwise in respect of the securities of any other person, firm or corporation when such securities are payable at periods of more than twelve months after the date thereof, without having first secured from the railroad commission an order authorizing it so to do. Every such assumption made other than in accordance with the order of the railroad commission authorizing the same shall be void. (Added Stats. 1927, Ch. 37.)

SEC. 7. (*a*) In all respects in which the railroad commission has power and authority under the constitution of this state or this act, applications and complaints may be made and filed with the railroad commission, process issued, hearings held, opinions, orders and decisions made and filed, petitions for rehearing filed and acted upon, and petitions for writs of review or mandate filed with the supreme court of this state, considered and disposed of by said court, in the manner, under the conditions and subject to the limitations and with the effect specified in the public utilities act.

(*b*) No person shall be excused from testifying or from producing any book, waybill, document, paper or account in any investigation or inquiry by or hearing before the commission or any commissioner or examiner when ordered to do so, upon the ground

that the testimony or evidence, book, waybill, document, paper or account required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he shall, under oath have testified or produced documentary evidence; *provided,* that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony. Nothing herein contained shall be construed as in any manner giving to any transportation company immunity of any kind. (Amended, Stats. 1925, Ch. 153, p. 302.)

SEC. 7½. (*a*) When complaint has been made to the commission concerning any rate, fare or charge for any service performed by any transportation company and the commission has found after investigation that the transportation company has charged an unreasonable, excessive or discriminatory amount for such service, the commission may order that the transportation company make due reparation to the complainant therefor with interest from the date of collection; *provided,* no discrimination will result from such reparation.

(*b*) If the transportation company does not comply with the order for the payment of reparation within the time specified in such order, suit may be instituted in any court of competent jurisdiction to recover the same. All complaints concerning unreasonable, excessive or discriminatory charges shall be filed with the commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the

court within one year from the date of the order of the commission. The remedy in this section provided shall be cumulative and in addition to any other remedy or remedies in this act provided in case of failure of a transportation company to obey an order or decision of the commission. (Added Stats. 1927, Ch. 38.)

SEC. 8. Every officer, agent or employee of any corporation, and every other person who violates or fails to comply with, or who procures, aids or abets in the violation of any provision of this act, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement, or any part or provision thereof, of the railroad commission, or who procures, aids or abets any corporation or person in his failure to obey, observe or comply with any such order, decision, rule, direction, demand or regulation, or any part or provision thereof, is guilty of a misdemanor and is punishable by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

SEC. 9. Neither this act nor any provision thereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of this union, except in so far as the same may be permitted under the provisions of the constitution of the United States and the acts of congress; *provided, however,* that with reference to transportation companies operating solely in interstate commerce between any point or points within this state and any point or points in any other state or in any foreign nation, the railroad commission shall have the power to prescribe such reasonable, uniform and non-

discriminatory rules and regulations in the interest and aid of public health, security, safety, convenience and general welfare as shall in its opinion be required by public convenience and necessity. (Amended, Stats. 1925, Ch. 254, p. 433.)

SEC. 10. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional.

SEC. 11. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed. The provisions of an act entitled "An act providing for the sale of street railroad and other franchises in counties and municipalities and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting acts (approved March 22, 1905; Stats. 1905, p. 777)," are declared not to apply to the use of highways for the kind of transportation herein regulated.

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